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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1960

No. 831

RUDOLPH EULE,

Petitioner,

vs.

MARY ELLEN EULE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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HAMMERSMITH-KORTMEYER CO.
MILWAUKEE

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No.

RUDOLPH EULE,

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vs.

MARY ELLEN EULE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Rudolph Eule prays that a Writ of Certiorari issued to review the Order and Judgment entered by the Supreme Court of Wisconsin, on January 5, 1960.

OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin is reported in 9 Wis. (2d) 115. The opinion of the Circuit Court for Waukesha County is not reported but is attached hereto in Appendix E.

JURISDICTION

The judgment of the Supreme Court of Wisconsin was made and entered on January 5, 1960, and a copy thereof is appended to this petition in Appendix H, at page 33a. The jurisdiction of this Court is invoked under the provisions of 28 U.S. Code, Section 1257(3). The courts of Wisconsin, contrary to the provisions of Section I, Art. IV, of the Constitution of the United States, refused to give full faith and credit to the entire Illinois decree which awarded the petitioner Rudolph Eule a divorce grounded upon wilful desertion and further granted the petitioner custody of the child of the parties, Debra Eule.

The Wisconsin court recognized the Illinois decree as to the status of the parties, but refused to give full faith and credit to the provisions of the decree regarding custody and the grounds for granting the divorce.

The Supreme Court of Wisconsin has affirmed an order of the Circuit Court for Waukesha County which permits that part of the respondent's complaint praying for custody of the child, alimony, support money and suit money to stand for trial. The petitioner's defense of res adjudicata is no longer open as an issue upon return of these proceedings to the Circuit Court for Waukesha County. Therefore, under previous decisions of this court, the matter is ripe for adjudication as a final decree under the policies set out in 28 U.S. Code, Section 1257(3). *Johnson v. Muelberger*, 340 U.S. 581, and *Pope v. Atlantic Coastline RR Co.*, 345 U.S. 379.

Petitioner states that the decision of the Supreme Court of Wisconsin is contrary to the decision of *Sherrer v. Sherrer*, 334 U.S. 343, *Coe v. Coe*, 334 U.S. 378, and *Cook v. Cook*, 342 U.S. 126. It presents a clear constitutional question under 28 U.S. Code, Section 1257(3).

QUESTION PRESENTED

The sole question is whether the courts of Wisconsin, under Article IV, Section 1, of the Constitution of the United States, are compelled to give full faith and credit to the entire Illinois decree which granted a divorce grounded upon wilful desertion on the part of the respondent, and which granted custody of the minor child of the parties to the petitioner.

The Illinois court obtained jurisdiction over the respondent by the service of a summons for divorce upon the respondent in the State of Wisconsin, and subsequent to the said service, the respondent appeared by her attorney in the Illinois court for the sole purpose of objecting to the jurisdiction of the Illinois court over her person. The respondent's attorney brought on a motion to dismiss the Illinois action based on the contention that the Illinois court did not have jurisdiction over the subject matter, and that there was another action pending between the same parties for the same cause in the State of Wisconsin.

The motion was dismissed by the Illinois court after a hearing on the same based upon the finding by the Illinois Court that it did have jurisdiction and that there was no action pending for the same cause and involving the same parties in the State of Wisconsin. Accordingly, the Illinois court subsequently entered the decree as set out above.

The Wisconsin court applied the doctrine of divisible divorce recognizing the validity of the Illinois decree for the divorce with regard to the status of the parties, but refused to recognize the provisions of the decree regarding custody of the child and the grounds upon which the decree was entered.

The Supreme Court of Wisconsin concluded that the appearance of the respondent in the Illinois court did not constitute a personal appearance, since the respondent was not physically present before the Illinois court. The court held that a foreign court could not obtain jurisdiction in personam where it does not appear that the party whose appearance is in question was physically present before that foreign court.

STATUTES INVOLVED

United States:

The first section of ARTICLE IV of the Constitution of the United States is primarily involved:

> "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

28 U.S. Code, Sec. 1738 provides:

> "Such acts, records, judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its territories and possessions as they have by law or usage in the courts of such state, territory or possession from which they are taken."

Wisconsin:

Wisconsin Statutes, Section 247.21, Vol. 2, page 3103 (1957):

> "Full faith and credit shall be given in all the courts of this state to a decree of annulment of marriage or divorce by a court of competent jurisdiction in another state, territory or possession of the United States,

when the jurisdiction of such court was obtained in the manner and in substantial conformity with the conditions prescribed in sections 247.05 and 247.06. Nothing herein contained shall be construed to limit the power of any court to give such effect to a decree of annulment or divorce, by a court of a foreign country as may be justified by the rules of international comity; provided, that if any inhabitant of this state go into another state, territory or country for the purpose of obtaining a decree of divorce for a cause which occurred while the parties resided in this state, or for a cause which is not ground for divorce under the laws of this state, a decree so obtained shall be of no force or effect in this state."

STATEMENT OF CASE

The parties to this action intermarried on July 6, 1953, at Milwaukee, Wisconsin. The parties subsequently moved to the State of New York where, due to marital discord, in November of 1955, the respondent removed herself and the child of the parties to the State of Wisconsin, and has since that time resided in that state. (App. G, p. 26a, 27a)

On arrival in Wisconsin, the respondent commenced an action for divorce in the Circuit Court for Waukesha County which was subsequently dismissed due to the fact that the respondent did not meet the residency requirements of Wisconsin at that time. (Rec. p. 7). The petitioner moved from the State of New York to the State of Illinois where he commenced an action in the Circuit Court for Cook County. The respondent was served in that action in the State of Wisconsin by a deputy sheriff for Waukesha County. (Rec. p. 74, App. D, p. 9a). The respondent appeared in the Illinois Court by her attorney, specially for the sole purpose of objecting to the jurisdic-

tion of the Illinois court over her person (Rec. p. 78, App. D, p. 11a). Subsequently, her attorney brought on a motion in the Illinois court to dismiss the Illinois action based on her contention that that court did not have jurisdiction over the subject matter, and that there was another action pending between the same parties for the same cause in the Circuit Court for Waukesha County, Wisconsin. (Rec. p. 93, App. D, p. 13a). The respondent supported that motion by an affidavit of her attorney in which it was stated that an action for divorce commenced in the Circuit Court for Waukesha County had been dismissed and that the respondent was proceeding to appeal that decision to the Supreme Court of the State of Wisconsin (Rec. p. 101-102, App. D, p. 14a).

The Illinois court dismissed this motion after hearing, based upon the court finding that it did have jurisdiction and that there was no action pending for the same cause involving the same parties in the Circuit Court for Waukesha County, Wisconsin (Rec. p. 110, App. D, p. 15a). Accordingly, it entered a decree on March 31, 1958. (Rec. p. 122, App. D, p. 17a).

Subsequent to the commencement of the Illinois action, the respondent commenced a second action for divorce in the State of Wisconsin, and the petitioner entered a general appearance in that matter. (App. G, p. 24a). The respondent's complaint was demurred to and the demurrer was sustained, but the respondent was permitted to amend her complaint. (Rec. p. 33).

The petitioner answered the amended complaint timely, and set out therein as an affirmative defense the existence of the Illinois decree and therefore, demanded that the action be dismissed. (Rec. p. 58, App. C, p. 5a, 6a). The petitioner then brought on a motion for summary

judgment requesting the court to dismiss the respondent's action, and in support of said motion, the petitioner executed an affidavit setting out the facts of the Illinois decree and incorporating therein, by way of exhibits, a duly authenticated and certified copy of the proceedings before the Circuit Court for Cook County, Illinois. (Rec. p. 61, App. D, p. 7a).

That motion for summary judgment was granted only to that part of the respondent's complaint alleging a cause of action for divorce, but allowing the questions of custody, alimony, support money and suit money to stand for trial, thereby granting full faith and credit to the [illegible]ois decree only for the purpose of adjudging the [illegible]s of the parties. (Rec. p. 138, App. F, p. 22a, 23a). [illegible]at part of the order which denied summary judgment and in effect refused to give full faith and credit to the Illinois decree in its entirety was appealed to the Supreme Court of Wisconsin, which affirmed the same. (App. G, p. 24a).

REASONS FOR GRANTING THE WRIT

The sole ground of error is that the Supreme Court of Wisconsin erred in not giving full faith and credit to the entire Illinois decree, as required by the provisions of Article IV, Section 1 of the Constitution of the United States.

This court has, on many occasions, distinguished those actions of divorce where there has been an appearance by both parties from those actions where the decree was entered on an ex-parte basis. The basic distinction for this was drawn originally from the case of *Pennoyer v. Neff*, 95 U.S. 714. There, this court states that if the

defendant appears, the cause becomes mainly a suit in personam. The question of what constitutes an appearance was defined in subsequent cases. The error committed by the Wisconsin Supreme Court lies with the added requirement it has imposed for an appearance to constitute an action in personam. The series of cases by which this court defined an appearance commenced with the action of *Davis v. Davis,* 305 U.S. 32. That case was a situation where the husband and wife were married in the District of Columbia, and as a result of marital discord, a separation decree was granted by the court of the District of Columbia. The defendant then went into the State of Virginia and brought an action for absolute divorce on the grounds of desertion, alleging that he had been a resident of the State of Virginia for the requisite time, and he fully disclosed the proceedings and decree of the District of Columbia court. The wife was personally served in the District of Columbia and she thereupon filed a plea stating that she appeared specially for the purpose of attacking the jurisdiction of the court. More particularly, she alleged that neither party had the requisite residence in the State of Virginia. The special appearance was overruled and the wife failed to appeal or file an answer or other pleading. In a later proceeding before the District of Columbia court, and after the final decree of absolute divorce had been rendered in the Virginia court, the District of Columbia court refused to give the Virginia decree full faith and credit for the reason that Virginia was not the matrimonial domicile, nor had the wife's special appearance given the Virginia court full jurisdiction to determine the matter. This court held that the determination of the Virginia court—that the husband was a bona fide resident of that state for the required time—is binding upon the District of Columbia court.

The Davis case, supra, was followed by *Williams v. North Carolina,* 317 U.S. 287. That case came before this court on two separate occasions. On the first occasion, the question arose as to whether a hubsand who goes to Nevada for the sole purpose of obtaining a divorce and then remarries while in Nevada and returns to North Carolina can be charged with bigamy by the State of North Carolina on the basis that the North Carolina court refuses to recognize the validity of the Nevada decree. Service upon the wife in the Nevada action was constructive. She made no appearance. This court held that the question of domicile of the husband in the State of Nevada must be presumed unless it is attacked, and therefore gave full faith and credit to the Nevada decree. Thereupon, the North Carolina court, upon the case being remanded, reexamined the Nevada findings to determine whether or not the domicile of the husband was bona fide. It thereupon determined that the husband had gone to Nevada solely for the purpose of securing a divorce, and refused to give full faith and credit to the Nevada decree. This court upheld that decision in *Williams v. North Carolina,* 325 U.S. 226.

The distinction between the Davis case, supra, and the Williams cases, supra, became quite clear in the companion cases *Sherrer v. Sherrer,* 334 U.S. 343, and *Coe v. Coe,* 334 U.S. 378. The Sherrer case was a situation where the husband and wife were domiciled in the State of Massachusetts and following a long period of marital difficulty, the wife, accompanied by the two children, left Massachusetts and went to Florida ostensibly for the purpose of spending a vacation. Shortly thereafter, in Florida, the wife informed the husband that she did not intend to return. She then filed a suit for divorce alleging extreme cruelty, and further alleging that she was a

bona fide resident of the State of Florida. The husband received the notice by mail and retained counsel in Florida and entered a general appearance. The husband later appeared personally and testified with respect to a stipulation entered into regarding the custody of the children. Counsel for the husband, although given the opportunity, failed to introduce evidence in rebuttal to the wife's allegation as to the residency in Florida. The decree was therefore entered by the Florida court and the wife remarried. The husband later attacked in a Massachusetts court the Florida decree on the basis that the wife had never domiciled in Florida. The Massachusetts court failed to give the Florida decree full faith and credit on the basis that the Massachusetts court was not prevented from reexamining the finding of the domicile made by the Florida court.

This court stated, on page 349:

> "* * * Here, unlike the situation presented in Williams v. North Carolina * * * the finding of the requisite jurisdictional facts was made in proceedings in which the defendant appeared and participated. The question with which we are confronted, therefore, is whether such a finding made under the circumstances presented by this case may, consistent with the requirements of full faith and credit, be subjected to collateral attack in the courts of a sister State in a suit brought by the defendant in the original proceedings."

This court went on to say, on page 351:

> "We believe that the decision of this court in the Davis case, and those in related situations, are clearly indicative of the result to be reached here. Those cases stand for the proposition that the requirements of full faith and credit bar a defendant from collaterally attacking a divorce decree on jurisdictional

ground in the courts of a sister State where there has been participation by the defendant in the divorce proceedings, where the defendant has been accorded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible to such collateral attack in the courts of the State which rendered the decree."

This court continued, on page 352:

"* * * If respondent failed to take advantage of the opportunities afforded him, the responsibility is his own. We do not believe that the dereliction of the defendant under such circumstances should be permitted to provide a basis for subsequent attack in the courts of a sister State on a decree valid in the state in which it was rendered."

In further distinguishing this case from the Williams case, supra, this court stated, on page 355:

"It is one thing to recognize as permissible, the judicial reexamination of findings of jurisdictional fact where such findings have been made by a court of a sister State which has entered a divorce decree in ex parte proceedings. It is quite another thing to hold that the vital rights and interests involved in divorce litigation may be held in suspense pending the scrutiny by courts of sister States of findings of jurisdictional fact made by a competent court in proceedings concluded in a manner consistent with the highest requirements of due process, and in which the defendant has participated. We do not conceive it to be in accord with the purposes of the full faith and credit requirement to hold that a judgment rendered under the circumstances of this case may be required to run the gantlet of such collateral attack in the courts of sister States before its validity outside of the State which rendered it is established or rejected. That vital interests are involved in divorce litigation indicates to us that it is a matter of greater,

rather than lesser importance, that there should be a place to end such litigation. And where a decree of divorce is entered by a competent court, under the circumstances of this case, the obligation of full faith and credit requires that such litigation should end in the courts of the State in which the judgment was rendered."

The Coe case, supra, is based upon the reasoning of the decision in the Sherrer case, supra. The facts are that the wife appeared personally in a Nevada divorce action commenced by the husband. This court held that since the action could not be collaterally attacked in the State of Nevada, it could not be collaterally attacked elsewhere. This court adhered to the principles it laid down in the Sherrer case, supra, and Coe case, supra, in the case of *Johnson v. Muelberger*, supra.

The Wisconsin Supreme Court, in arriving at its determination of what constitutes an appearance, relied upon the previous case decided by that court, *Davis v. Davis*, 259 Wis. 1, 47 N.W. (2d) 338 (1950). In that case the husband went to Wyoming for the purpose of getting a divorce. The wife retained an attorney in Wyoming and entered a formal special appearance for the purpose of objecting to the jurisdiction of the Wyoming court based on the allegations that the husband lacked domicile in that state. The court held in that case, in reviewing the decisions of this court, that the personal appearance, or opportunity to participate meant physical presence of the party in court, and a special appearance by counsel does not amount to a personal appearance by the party.

In *Cook v. Cook*, 342 U.S. 126, where an attempt was made to collaterally attack a Florida decree in the State of Vermont, this court held in that case that a judgment

presumes jurisdiction over the subject matter and over the persons, and that the burden of undermining the decree of a sister state "rests heavily upon the assailant". This court stated therein at page 128, "That presumption may of course be overcome by showing for example that Mann never was served in Florida nor made an appearance in the case, either generally or specially to contest the jurisdictional issues."

Nowhere in the line of cases outlined herein has this court held that to constitute a personal appearance there must be a physical presence of the party before the court. The objective of the cases cited above is obviously to declare that in order for an in personam judgment to be rendered by a court, the party to be bound must have notice. By the very fact that a person makes a special appearance in an action, and retains an attorney for that purpose, the requirement of notice has been fulfilled, and the matter of whether or not the party desires to physically present himself before the court is of no consequence to a determination of jurisdiction.

The position taken by the Wisconsin Supreme Court —a position not previously considered by this court—completely departs from the rationale used by this court in previous cases. To permit the State of Wisconsin to maintain this position deprives residents of other states in the Union, who in good faith enter the jurisdiction of the State of Wisconsin for the purpose of showing that the matter is res judicata, of the constitutional guarantee that an in personam judgment rendered by a foreign state will be given full faith and credit in its entirety pursuant to Section 1, Article IV, of the Constitution of the United States.

CONCLUSION

We submit that the principle of giving full faith and credit to the entire decree for divorce entered by the courts of the State of Illinois is the only sound rule, and since the Supreme Court of Wisconsin has refused to recognize the Illinois decree in its entirety, and give full faith and credit to the same, a petition for a Writ of Certiorari should be granted and the ruling of the Supreme Court of Wisconsin reversed.

Respectfully submitted,

WILLIAM E. GLASSNER, JR.
LAWRENCE CLANCY, of Counsel
2218 North Third Street
Milwaukee 12, Wisconsin
Attorneys for Petitioner

APPENDIX A

(Pertinent portions of transcript served upon respondent, Mary E. Eule)

State of Wisconsin } (ss)
Waukesha County }

ARTHUR J. BOOMER, being first duly sworn on oath deposes and says, that he is a duly qualified and acting deputy sheriff of Waukesha County, State of Wisconsin; that on the 3rd day of April, 1958 at the City of Oconomowoc, in said County of Waukesha, I duly served the within Transcript of Proceedings on the within named defendant, Mary E. Eule, by then and there delivering to and leaving with her personally a true copy thereof and I endorsed my name, official title and date of service on said copy.

Dated April 4th, 1958.

Arthur J. Boomer

UNITED STATES OF AMERICA

State of Illinois, } ss.
County of Cook }

PLEAS, before the Honorable Francis P. Hangan, Judge of the City Court of West Frankfort of the State of Illinois, holding a branch of the Circuit Court of Cook County at the request of the Judges of said Circuit Court, at a term thereof begun and holden at Chicago, in the Court House, in said County and State, on the third Monday (being the 17 day of March in the year of Our Lord one thousand nine hundred and 58 and of the Independence of the United States, the one hundred and 82.

PRESENT, Honorable Francis P. Hanagan, Judge of the City Court of West Frankfort of the State of Illinois,

holding a branch of the Circuit Court of Cook County, State of Illinois.

Ben Adamowski
State's Attorney

Joseph D. Lohman
Sheriff

Attest:
Francis X. Connell
Clerk

Be It Remembered, that at the term aforesaid, to-wit: On the 31 day of March A.D., 1958, the following among other proceedings were had and entered of record in said Court, to-wit:

Decree for Divorce

CIRCUIT COURT OF COOK COUNTY, ILLINOIS

RUDOLPH EULE

vs. No. 57 C 9538

MARY E. EULE

This day came again the said Plaintiff by Mr. Victor H. Goulding, Attorney at Law, and the Court being satisfied that all proper means have been taken to notify the Defendant of the pendency of this suit according to the Statute in such case made and provided.

And the Court having heard the cause by examination of witnesses in open Court, and now being fully advised in the premises, finds that it has jurisdiction of the parties hereto and the subject matter hereof; that the Plaintiff is and since prior to the filing of said Complaint has been an actual resident of Cook County, and has been a resi-

dent of the State of Illinois for over one whole year next before the filing of the Complaint herein; that the parties hereto were lawfully joined in marriage on to-wit: July 6, 1953 in Milwaukee, Wisconsin, and that subsequent to their intermarriage the Defendant has been guilty of wilful desertion and absented herself from the plaintiff without any reasonable cause for the space of more than one whole year, prior to the filing of this complaint as charged in Plaintiff's Complaint.

It is therefore Ordered, Adjudged and Decreed that the bonds of matrimony heretofore existing between the Plaintiff Rudolph Eule and the Defendant Mary E. Eule, be and are hereby dissolved.

It Is Further Ordered, Adjudged and Decreed the plaintiff have the sole care, custody and education of the minor child, Debra Lee Eule.

ENTER

Judge Hanagan

Mar. 31, 1958

APPENDIX B

(Pertinent portions of Amended Complaint)

12. That a prior action for a divorce was commenced in this court and was dismissed by the court in July of 1957; that the defendant attempted to commence an action for divorce in the Circuit Court of Cook County, Illinois, but failed to serve the summons upon the plaintiff, and on information and belief that no action was legally commenced; that no other action was commenced or is pending in this court or elsewhere.

Wherefore, plaintiff demands judgment that the bonds of matrimony between the plaintiff and defendant be wholly dissolved and that the plaintiff be given an absolute divorce and that the plaintiff be allowed permanent alimony and support money for herself and for the minor child of the parties to this action; and that the plaintiff be awarded the care and custody of said child and for such other and further relief as may be just and equitable, including payment of plaintiff's costs and expenses of this action.

APPENDIX C

(Pertinent portions of Answer to Amended Complaint)

13. Answering Paragraph 12 of the plaintiff's amended complaint, the defendant admits that an action was commenced by the plaintiff in the Circuit Court for Waukesha County, which was dismissed by the Circuit Court for Waukesha County August 1, 1957, because of lack of jurisdiction of said court; admits that the defendant commenced an action for divorce in the Circuit Court for Cook County, Illinois, the details of which will be more specifically set out as and for a further defense to this action; denies that the defendant failed to serve the plaintiff with a summons in said action, and denies that there was no other action legally commenced.

As and for an affirmative defense to this action, the defendant alleges, to-wit:

1. That on or about the 5th day of July, 1957, at the City of Oconomowoc, Waukesha County, Wisconsin, Arthur J. Boomer, a deputy sheriff, duly served a praecipe divorce and a summons for divorce on Mary E. Eule, which action issued out of the Circuit Court of Cook County, Illinois, in an action brought in said Circuit Court for Cook County, Illinois, wherein Rudolph Eule was plaintiff and Mary E. Eule was defendant, for a cause of action for divorce upon the grounds that Mary E. Eule, the defendant therein, wilifully abandoned the plaintiff without reasonable cause or provocation on or about the 27th day of November, 1955, and that a judgment was duly rendered wherein it was ordered, adjudged, and decreed that the bonds of matrimony existing between the plaintiff Rudolph Eule and the defendant Mary E. Eule were dissolved, and wherein it was further ordered,

adjudged and decreed that the plaintiff Rudolph Eule had the sole care, custody and education of the minor child of the parties, Deborah Lee Eule, said decree being entered of record in the aforesaid court on the 31st day of March, 1958.

Wherefore; defendant demands that the amended complaint of the plaintiff be dismissed upon its merits, together with the costs and disbursements of this action.

APPENDIX D

(Pertinent portions of Order to Show Cause, supporting Affidavit and Exhibit)

STATE OF WISCONSIN WAUKESHA COUNTY
CIRCUIT COURT

MARY ELLEN EULE
Plaintiff

vs.

ORDER
#55-879

RUDOLPH EULE
Defendant

Upon the annexed affidavit and exhibits, and now on motion of Glassner, Clancy & Glassner, attorneys for the defendant,

It Is Ordered that the above named plaintiff appear before the Honorable Allan D. Young, Circuit Judge, Waukesha County, Wisconsin, in his courtroom in the Waukesha County courthouse, at 10 o'clock in the forenoon on March 6, 1959, and show cause why summary judgment should not be entered in this matter.

Let a copy of this order, affidavit and exhibits be served upon the plaintiff's attorneys, Wittig & Wittig, at least 2 days before the time set for hearing.

Dated at Waukesha, Wisconsin, this 25th day of February, 1959.

By the Court:

Allan D. Young
Circuit Judge

STATE OF WISCONSIN WAUKESHA COUNTY
CIRCUIT COURT

MARY ELLEN EULE
Plaintiff

vs.

RUDOLPH EULE
Defendant

AFFIDAVIT
#55-879

State of Wisconsin
Milwaukee County } ss.

RUDOLPH EULE being first duly sworn on oath deposes and says that he is the defendant in the above entitled cause; that he makes this affidavit in support of defendant's motion for a summary judgment against the plaintiff in the above entitled cause; that all of the facts herein set forth are within his personal knowledge; that the facts entitle the defendant to a summary judgment against the plaintiff, and are as follows:

That on or about the 5th day of July, 1957, at the City of Oconomowoc, Waukesha County, Wisconsin, Arthur J. Boomer, a deputy sheriff, duly served a praecipe divorce and a summons for divorce on Mary E. Eule, which action issued out of the Circuit Court of Cook County, Illinois, in an action brought in said Circuit Court for Cook County, Illinois, wherein Rudolph Eule was plaintiff and Mary E. Eule was defendant, for a cause of action for divorce upon the grounds that Mary E. Eule, the defendant therein, willfully abandoned the plaintiff without reasonable cause or provocation on or about the 27th d of November, 1955, and that a judgment was duly rendered wherein it was ordered, adjudged, and de-

creed that the bonds of matrimony existing between the plaintiff Rudolph Eule and the defendant Mary E. Eule were dissolved, and wherein it was further ordered, adjudged and decreed that the plaintiff Rudolph Eule had the sole care, custody and education of the minor child of the parties, Deborah Lee Eule, said decree being entered of record in the aforesaid court on the 31st day of March, 1958.

That appended hereto and incorporated herein by reference are the records and judicial proceedings of the Circuit Court of Cook County, Illinois, and marked "Defendant's Exhibit 1", duly authenticated and certified in accordance with the law as in such cases is made and provided.

That affiant verily believes that plaintiff's action has no merit.

Rudolph Eule

State of Wisconsin }
Waukesha County } ss.

ARTHUR J. BOOMER, being first duly sworn on oath, deposes and says that he is a duly qualified and acting Deputy Sheriff of Waukesha County, State of Wisconsin: that on the 5th day of July, 1957, at the City of Oconomowoc, in said County of Waukesha, I duly served the within Summons-Divorce on the within named defendant, Mary E. Eule, by then and there delivering to and leaving with her personally, a true copy thereof and I endorsed my name and official title and date of service on said copy.

Dated July 8th, 1957.

Arthur J. Boomer

IN THE CIRCUIT COURT OF
COOK COUNTY

RUDOLPH EULE

Plaintiff,

vs. No. 57 C 9538

MARY E. EULE

Defendant.

To the above named defendant(s):

Plaintiff has commenced suit for divorce.

You are hereby summoned and required to file your appearance in this case, in the office of the Clerk of this Court, not later than 20 days from the date this summons is served upon you. You are also required to file your answer to the plaintiff's complaint within 20 days from the day said complaint is filed, but in any event not before the date your appearance is required to be filed.

This summons must be returned by the officer or other person to whom it was given for service, with indorsement thereon of service and fees, if any, within 5 days after service thereof; upon failure to obtain service, this summons shall be returned not later than 20 days from the date hereof.

Witness: Francis X. Connell, the Clerk of said Court, and the seal thereof, at Chicago, Illinois, this 28th day of June, 1957.

Francis X. Connell

Clerk

IN THE CIRCUIT COURT OF
COOK COUNTY

RUDOLPH EULE, Plaintiff

vs. No. 57 C 9538

MARY E. EULE, Defendant

SPECIAL AND LIMITED APPEARANCE

JOHN SILLS JONES, attorney for Mary E. Eule, hereby enters the Special and Limited Appearance of Mary E. Eule for the sole purpose of objecting to the jurisdiction of the Court over the person of said Defendant.

Mary E. Eule, Defendant

By John Sills Jones
Her attorney

IN THE CIRCUIT COURT OF
COOK COUNTY

RUDOLPH EULE,
Plaintiff,

vs. No. 57 C 9538

MARY E. EULE,
Defendant.

COMPLAINT FOR DIVORCE

Now comes the plaintiff, Rudolph Eule, by Victor H. Goulding, his attorney, and alleges and states as follows:

1. That he is an actual resident of the City of Chicago, County of Cook, and State of Illinois, and is now and has

been for more than one year immediately preceding the filing of this Complaint, a resident of the State of Illinois.

2. That on, to-wit: July 6, 1953, at Milwaukee, Wisconsin, he was lawfully married to the defendant; that from that day until on, to-wit: November 27, 1955, he did live and cohabit with her as her husband, and always conducted himself towards her as a good, true and faithful husband.

3. That notwithstanding her marriage vows and duties as a wife, the defendant wilfully absented herself from the plaintiff without reasonable cause or provocation on or about the 27th day of November, 1955, and has persisted in said desertion to this date.

4. That one child was born as the result of the said marriage, namely, Debra Lee, 2½ years of age.

Wherefore, plaintiff, Rudolph Eule, asks that the marriage between him and the defendant, Mary E. Eule, be dissolved and declared null and void by the judgment of this Court. That the sole care, custody, education and control of the minor child of the parties herein, Debra Lee Eule, be granted to your plaintiff, and for such other and further relief as to the Court may seem fit.

IN THE CIRCUIT COURT OF
COOK COUNTY.

RUDOLPH EULE,

Plaintiff,

vs. No. 57 C 9538

MARY E. EULE,

Defendant.

MOTION TO DISMISS

Now comes John Sills Jones, attorney for Mary E. Eule, defendant in the above-entitled cause, and moves this Honorable Court to dismiss the above-entitled cause for the following reasons:

1. The Court does not have jurisdiction of the subject matter of the action.

2. There is another action pending between the same parties for the same cause.

John Sills Jones

Attorney for Mary E. Eule, Defendant

John Sills Jones hereby certifies that he is one of the attorneys of record for May E. Eule, defendant; that the aforesaid Motion is well founded in point of law and is not interposed for purposes of delay.

John Sills Jones

IN THE CIRCUIT COURT OF
COOK COUNTY

RUDOLPH EULE,

Plaintiff

vs. No. 57 C 9538

MARY E. EULE,

Defendant

AFFIDAVIT

JOHN SILLS JONES, being first duly sworn upon oath, deposes and says that he is an attorney at law, duly licensed to practice in the State of Illinois, and a member of the firm of Davis, Boyden, Jones & Baer, attorneys for Defendant Mary E. Eule;

That on to-wit: April 2, 1956 in the Circuit Court of Waukesha County, State of Wisconsin, Mary E. Eule filed a suit for Divorce against Rudolph Eule; that personal service of Summons was obtained upon said Defendant in the State of Wisconsin; that said Defendant appeared personally and by his attorney and contested the said action; that a decision was rendered against the said Mary E. Eule, and her attorneys have by action duly taken, prayed an appeal;

that by reason of the foregoing the said Circuit Court of Waukesha County, State of Wisconsin has jurisdiction over the parties hereto and the subject matter hereof.

John Sills Jones
Attorney for Mary E. Eule

ORDER

CIRCUIT COURT OF
COOK COUNTY

RUDOLPH EULE vs. MARY E. EULE

General No. 57 C 9538

This cause coming on pursuant to the special and limited appearance of Mary E. Eule, by her attorney, John Sills Jones, and the motion to dismiss heretofore filed by said attorney, and the Court having heard the evidence presented by plaintiff, Rudolph Eule, and being fully apprised in the circumstances, finds that the Circuit Court of Cook County, Illinois has jurisdiction of the subject matter of the above cause; that the Circuit Court of Waukesha County, State of Wisconsin, and the State of Wisconsin, do not have jurisdiction of the subject matter of the cause entitled "Mary Ellen Eule vs. Rudolph Eule" heretofore filed in the Circuit Court of Waukesha County, State of Wisconsin, and the Court further finds that Mary E. Eule was a resident of the State of New York at the time of the filing of her Complaint for Divorce in said Circuit Court of Waukesha County, State of Wisconsin, which Court found by Decree of August, 1957 that neither Rudolph Eule nor Mary Ellen Eule had been a resident of the State of Wisconsin for two years prior to the filing of her said Complaint in said County, and the Court having considered the documentary evidence consisting of the Complaint of Mary Ellen Eule filed in the Circuit Court of Waukesha County, Wisconsin and the two Decrees and Orders in said Court entered in July, 1957 and August, 1957;

It Is Hereby Ordered that the Motion of Mary E. Eule to dismiss the Complaint of Rudolph Eule for lack

of jurisdiction and because there was another action pending between the parties in the same cause be and the same is hereby denied.

ENTER:

Francis P. Hanagan
Judge

Dated: Jan. 22nd, 1958.

ORDER

CIRCUIT COURT OF
COOK COUNTY

Rudolph Eule vs. Mary E. Eule

General No. 57 C 9538

This matter coming on to be heard on the hearing on the issues herein, after an order of default against the defendant having been entered by this Court, and the plaintiff, by his counsel, having moved the Court for leave to amend the plaintiff's complaint for divorce instanter on its face, and the Court being fully advised in the premises,

It is hereby ordered that leave be and it is hereby granted to the plaintiff to amend his complaint for divorce instanter, on its face, by adding the following words and paragraph to his prayer for relief therein, namely: "That the sole care, custody, education and control of the minor child of the parties herein, Debra Lee Eule, be granted to your plaintiff, Rudolph Eule, and for such other and further relief as to the Court may seem fit."

ENTER

Francis P. Hanagan
Judge

Mar. 21, 1958

Decree for Divorce

CIRCUIT COURT OF
COOK COUNTY

RUDOLPH EULE

vs. No. 57 C 9538

MARY E. EULE

This day came again the said Plaintiff by Mr. Victor H. Goulding, Attorney at Law; and the Court being satisfied that all proper means have been taken to notify the Defendant of the pendency of this suit according to the Statutes in such case made and provided.

And the Court having heard the cause by examination of witnesses in open Court, and now being fully advised in the premises, finds that it has jurisdiction of the parties hereto and the subject matter hereof; that the Plaintiff is and since prior to the filing of said Complaint has been an actual resident of Cook County, and has been a resident of the State of Illinois for over one whole year next before the filing of the Complaint herein; that the parties hereto were lawfully joined in marriage on to-wit: July 6, 1953 in Milwaukee, Wisconsin, and that subsequent to their intermarriage the Defendant has been guilty of wilful desertion and absented herself from the plaintiff without any reasonable cause for the space of more than one whole year, prior to the filing of this complaint as charged in Plaintiff's Complaint.

It is therefore Ordered, Adjudged and Decreed that the bonds of matrimony heretofore existing between the Plaintiff Rudolph Eule and the Defendant Mary E. Eule, be and are hereby dissolved.

It Is Further Ordered, Adjudged and Decreed the plaintiff have the sole care, custody and education of the minor child, Debra Lee Eule.

ENTER

Francis P. Hanagan
Presiding Judge

Judge Hanagan
Mar. 31, 1958.

APPENDIX E

Decision of Circuit Court for Waukesha County, Wisconsin granting in part petitioner's prayer for Summary Judgment.

STATE OF WISCONSIN WAUKESHA COUNTY
CIRCUIT COURT

MARY ELLEN EULE,

Plaintiff,

vs. DECISION

RUDOLPH EULE,

Defendant.

The matter comes before the Court on a motion for summary judgment.

According to the records of this Court, there has been filed portions of the proceedings of an action of the Circuit Court of Cook County, Illinois, in which the defendant, Rudolph Eule, is the plaintiff versus the plaintiff, Mary Ellen Eule, who is the defendant, which action was commenced on July 5, 1957, for an absolute divorce. The affidavit of the Deputy Sheriff of Waukesha County shows personal service on the said date on Mary Ellen Eule, and the complaint prays for an absolute divorce. Mary Ellen Eule appeared specially and objected to the jurisdiction of the Illinois Court for the reason that the Court had no jurisdiction and also for the reason that there was another action pending, which objection and motion was denied. No general appearance was made. On July 21, 1957, the plaintiff, Rudolph Eule, moved to

amend the complaint by praying for the custody of the child of the said parties, which motion was granted. The record does not show any notice of said motion to the defendant, Mary Ellen Eule. Judgment for absolute divorce was granted the plaintiff, Rudolph Eule, on March 31, 1958, and also awarding him custody of the child of said parties.

The above entitled action was commenced by the service of a summons on March 18, 1958, for an absolute divorce, custody of the child, and alimony and support money. The defendant answered by a plea in bar alleging the Illinois divorce. At the hearing on the above motion for summary judgment, it appeared that the officer did not serve the summons on Mary Ellen Eule, but served the same on a third party, that he signed the affidavit of service in blank, and the same was filled out by a third party without his knowledge of the contents of the affidavit. It was stipulated by the attorneys that Mary Ellen Eule and the child were never at any time within the jurisdiction of the Illinois Court.

The fact that the affidavit of service filed in the Illinois Court shows personal service on the defendant, Mary Ellen Eule, gave the Illinois Court jurisdiction of the action. The affidavit upon which the special appearance was based was for lack of jurisdiction, the matter of service was brought up at that time or should have been, and it cannot now be attacked collaterally. The judgment of the Illinois Court is entitled to full faith and credit under the law. As to the second portion of the action, regarding the custody of the child, the defendant, Mary Ellen Eule, was not notified of the amendment, and the said Mary Ellen Eule and the child were never within the jurisdiction of the Illinois Court as was stipulated to by the parties.

Therefore, that part of the Illinois judgment that pertains to the custody of the child is void, and it is ordered that the first part of the complaint regarding the absolute divorce be stricken, and that the balance of the complaint regarding the custody of the child, alimony, support money and suit money stand for trial in this action.

Since the motion for summary judgment was granted in part and denied in part, the Court will not award any motion costs to either party.

Dated this 1st day of June, 1959.

Allen D. Young
Acting Circuit Judge

APPENDIX F

Order based on decision set out in Appendix E.

STATE OF WISCONSIN WAUKESHA COUNTY
CIRCUIT COURT

MARY ELLEN EULE,
Plaintiff

vs.

Case No. 55-879
ORDER

RUDOLPH EULE,
Defendant

The above entitled action having come on for hearing on April 3, 1959, upon motion of Glassner, Clancy & Glassner, attorneys for the defendant, for summary judgment for the defendant, and Lawrence Clancy appearing for the defendant Rudolph Eule in support of said motion, and John Wittig appearing for the plaintiff Mary Ellen Eule, in opposition thereto;

And the Court having heard the argument of counsel, and having read and considered the affidavit of Rudolph Eule in support of said motion, and upon all the record in the file and briefs submitted by counsel;

It Is Ordered that the motion of the defendant for summary judgment, dismissing the plaintiff's complaint, pursuant to Supreme Court Rule, sec. 270.635, be and the same is hereby granted, with respect to that part of the plaintiff's complaint praying for an absolute divorce;

and that part of the complaint praying for custody of the child, alimony, support money and suit money stand for trial, without costs to either party.

Dated this 15th day of June, 1959.

By the Court:

Allan D. Young

Allan D. Young,
Acting Circuit Judge

APPENDIX G

Opinion of the Supreme Court of Wisconsin affirming the Order of the Circuit Court for Waukesha County set out in Appendix F.

No. 132

August Term, 1959

STATE OF WISCONSIN — IN SUPREME COURT

MARY ELLEN EULE,

Respondent,

v.

RUDOLPH EULE,

Appellant.

APPEAL from parts of two orders of the circuit court for Waukesha County: Allan D. Young, Circuit Judge. *Affirmed.*

This action for divorce, custody, alimony and support money was commenced by the respondent wife against the appellant March 18, 1958, in the circuit court for Waukesha county. The appellant was served in Illinois, appeared in this action, and demurred to the complaint. The order overruling his demurrer was appealed to this court and reversed. *Eule v. Eule* (1958), 5 Wis. (2d) 543, 93 N.W. (2d) 438.

The appellant obtained a writ of execution to recover his costs on the appeal. On February 9, 1959, the trial court restrained the appellant from enforcing payment until a final determination of this action. At that time there was pending a motion of the respondent to hold the appellant in contempt for failing to pay temporary ali-

mony and $20 per week for the support of the minor child of the parties. This motion was adjourned. Subsequently the appellant was found in contempt. The appellant residing in Illinois and beyond the jurisdiction of the court was not committed. From that part of the order restraining the appellant from collecting his costs, he appeals.

The part of the other order appealed from denied summary judgment to the appellant. After an amended complaint was filed, the appellant answered and moved for summary judgment dismissing the amended complaint. The affidavit in support of the motion set forth that a previous decree of divorce between the parties was entered in the circuit court for Cook County, Illinois, on March 31, 1958, in which the appellant was granted a divorce from the respondent on the grounds of desertion and in which the appellant was granted the care and custody of the minor child of the parties.

In opposition to this motion the respondent put in evidence the record of the Illinois divorce action. This record shows the respondent was served in the divorce action on July 5, 1957, in the city of Oconomowoc, Wisconsin, and she appeared specially in the action for the sole purpose of objecting to the jurisdiction of the Illinois court. Her motion to dismiss the action was denied. Thereafter the respondent took no further part in the divorce action. Upon the hearing of the motion for summary judgment the parties stipulated that the respondent and the minor child "were never at any time within the jurisdiction of the Illinois court."

The record also shows that on March 21, 1958, the Illinois court entered two orders. One recited the summons was served on the respondent and she having failed to answer or otherwise make an appearance therein, set

a hearing on the complaint at 9:30 a. m. the same day. The other order granted leave *instanter* to amend the complaint on its face by adding to the prayer a request for custody of the minor child. The amended complaint requesting custody of the child was not served on the respondent. A default judgment was entered on March 31, 1959, against the respondent dissolving the marriage and granting custody of the child to the appellant.

The trial court entered an order on June 15, 1959, granting the appellant's motion for summary judgment dismissing the complaint to the extent the complaint prayed for an absolute divorce and denied the motion as to that part praying for custody of the child, alimony, support money, and attorney's fees.

HALLOWS, J. The first question presented is whether a Wisconsin court having personal jurisdiction of the husband and wife in an action by the wife for a divorce, alimony, custody of the minor child and its support, must give full faith and credit to an Illinois divorce decree awarding custody of the child to the husband when that decree was obtained by the husband in a divorce action in an Illinois court which had no personal jurisdiction over the mother or the child. No question is raised on this appeal that the Illinois decree so far as it dissolved the marital status of the parties is not entitled to full faith and credit. The question concerns only that part of the Illinois decree awarding custody and making no reference to alimony.

It is without dispute that the mother and the child resided in Wisconsin and the appellant husband resided in Illinois. The parties were married in Wisconsin July 6, 1953, and for sometime lived in New York. On November 27, 1955, the wife left the husband, taking the child

with her. Neither the mother nor the child was within the state of Illinois at the time of the Illinois divorce proceeding or personally served in Illinois.

The appellant urges that full faith and credit of the entire Illinois decree must be given under sec. 247.21, Stats. This section does not add anything that is not required by Art. IV, sec. 1, of the United States Constitution on full faith and credit. It applies to decrees of annulment of marriage or divorce when the jurisdiction of such foreign courts was obtained in the manner and in substantial conformity with methods of commencing such actions in this state. The section does not expressly refer to custody of children or to decrees of alimony. We do not construe the statute to change the case law in this state as to those matters. Alimony and custody of children are separate issues in a divorce action and if not adjudicated in the divorce action may be the subject of a separate action. A divorce action is divisible into status, alimony, and custody. *Pollock v. Pollock* (1955), 273 Wis. 233, 77 N.W. (2d) 485.

The gist of the appellant's argument is that the Illinois decree is entitled to full faith and credit, even though the respondent was not personally served in the state of Illinois because she made an appearance and therefore participated in that action. It is true that the defendant appeared but under the law of Illinois it was a special and limited appearance to raise the jurisdictional question and was so treated by the Illinois court. In the order of the Illinois court finding the respondent in default it is recited the respondent failed to file an answer or otherwise make an appearance in the action. The appellant relies on *Davis v. Davis* (1938), 305 U.S. 32, 92 L. Ed. 1566, 68 Sup. Ct. 1216; *Williams v. North Carolina* (1942),

317 U.S. 287, 87 L. Ed. 79, 63 Sup. Ct. 207; *Sherrer v. Sherrer* (1948), 334 U.S. 343, 92 L. Ed. 1429, 68 Sup. Ct. 1087; *Coe v. Coe* (1948), 334 U.S. 378, 92 L. Ed. 1451, 68 Sup. Ct. 1094.

Those cases involved the jurisdiction of foreign courts to grant divorces dissolving the marital status, not jurisdiction to award custody of children of the parties or alimony. The doctrine of the *Scherrer* and *Coe Cases, supra*, that the opportunity of the nonresident to contest the jurisdictional issue of domicile is sufficient to give the court jurisdiction to dissolve the marital status has not been applied to sustain jurisdiction in custody cases. In those cases, as pointed out by this court in *Davis v. Davis* (1951), 259 Wis. 1, 47 N.W. (2d) 338, both parties to each action were physically present and participated in the divorce proceedings. The *Davis Case, supra*, concluded that "personal appearance" or the opportunity to participate meant physically present in court and a special appearance by counsel did not amount to a personal appearance by the party. Such is the situation with this respondent. She made a special appearance under the law of Illinois but not a personal appearance for the purpose of contesting not domicile, but an issue of jurisdiction which is not being relitigated in this action.

Since the *Sherrer* and *Coe Cases, supra*, were decided the United States Supreme Court had an opportunity to apply the personal appearance doctrine to custody cases but did not do so. In *May v. Anderson* (1953), 345 U.S. 528, 97 L. Ed. 1221, Sup. Ct. 840, the court considered a Wisconsin *ex parte* divorce awarding custody to the husband of children who were with their mother in Ohio, who was not personally served in Wisconsin, and held that in a *habeas corpus* proceeding which raised the issue of the right of the mother to possession of her minor

children, the Ohio court was not bound by the full faith and credit clause of the federal constitution to give effect to the Wisconsin decree because the Wisconsin court did not have personal jurisdiction of the mother. The argument that personal jurisdiction was not required of the mother was advanced in the dissenting opinion. The majority opinion stated the rights of parents to the custody, care, management, and companionship of their minor children were far too precious to be cut off by a court which did not have jurisdiction over the parents *in personam*. A parent's right to custody of his children is a personal right and cannot be affected in a divorce action unless the court has personal jurisdiction over the parent. The full faith and credit clause does not entitle a judgment *in personam* to extra-territorial effect when it is made to appear such judgment was rendered without personal jurisdiction of the person sought to be bound.

The rule is stated in 17a Am. Jur., Divorce and Separation, p. 177, sec. 994, "Thus, where a nonresident parent has custody of a child in another state after a separation of the spouses, and has a right to custody, this is a personal right which cannot be terminated without jurisdiction over such parent *in personam;* the divorce court, in a state in which he or she is not domiciled, cannot gain jurisdiction to terminate that right by constructive service." Citing *May v. Anderson, supra; Kline v. Kline* (1881), 57 Iowa 386, 10 N.W. 825; *Newell v. Newell* (1956), 77 Idaho 355, 293 Pac. (2d) 663; *Harris v. Harris* (1894), 115 N.C. 587, 20 S.E. 187. For discussion of this and related problems on lack of jurisdiction in custody cases see Annos. 116 A.L.R. 1304 and 160 A.L.R. 403. The case of *Greef v. Greef* (1959), 6 Wis. (2d) 269, 94 N.W. (2d) 625, cited by the appellant, is

not in point. In that case the court granting custody of the children had and retained personal jurisdiction over the parties. The state of Illinois had no personal jurisdiction in this case.

Since the Illinois decree granted custody of the child to the appellant in a divorce action in which the Illinois court did not have personal jurisdiction over the mother or jurisdiction over the child, the Illinois decree to that extent is not entitled to full faith and credit in this state.

There is an additional reason why the Illinois decree so far as the custody is concerned is not entitled to full faith and credit. The original complaint sought only a divorce. On March 21, 1959, an order of default was entered. Another order on the same day was entered by the Illinois court allowing the appellant to amend the complaint *instanter* to include a prayer for custody of the minor child. Within ten days thereafter the *ex parte* decree was granted awarding custody. There is no recitation in this decree that the respondent was ever served with the amended complaint or had notice of it. The facts in the record are that she denies having any knowledge of the amended complaint and service thereof. This fact is uncontested. Under such circumstances the Illinois court is without any jurisdiction to grant custody of the child to the appellant.

A court must have personal jurisdiction over a person to bind him on the issue of alimony. In *Estin v. Estin* (1948), 334 U.S. 541, L. Ed. 1561, 68 Sup. Ct. 1213, and *Kreiger v. Kreiger* (1948), 334 U.S. 555, 92 L. Ed. 1572, 68 Sup. Ct. 1221, the Supreme Court sustained the validity of Nevada divorce decrees obtained without personal service on the wife so far as it dissolved the bonds of matrimony, but held Nevada was without power to cut

off in such *ex parte* divorce proceedings the wife's right to financial support under a prior decree of another state. In these cases the Supreme Court recognized the divisibility of a decree of divorce as this court did in the *Pollock Case, supra.* In a divorce action commenced by the wife in which there is no personal jurisdiction over the husband the court is without power to grant alimony binding upon the husband because the duty to pay alimony is personal. Likewise, a court without personal jurisdiction over the defendant wife cannot foreclose her or cut off her right to alimony because the right to alimony is a personal right.

Whether the Illinois decree passed on the question of alimony inferentially by making no provision for it, as contended by the appellant, or did not pass on the issue as urged by the respondent, is immaterial because in either case the court had no jurisdiction *in personum* to adjudicate the issue. In *Armstrong v. Armstrong* (1956), 350 U.S. 568, 100 L. Ed. 705, 76 Sup. Ct. 629, a husband residing in Florida obtained a Florida decree of divorce on constructive service which provided no award of alimony was made to the wife who was in Ohio and did not appear. The Supreme Court held the Florida court did not adjudicate the wife's right to alimony and the Ohio court did not fail to give full faith and credit to the Florida decree when it denied a divorce to the wife because of the prior Florida decree but granted the wife alimony. In the dissenting opinion four justices were of the opinion that the Florida court did adjudicate the question of alimony and because the right to alimony was personal, it could not be adjudicated without personal service and on that ground the decree was not entitled to full faith and credit. See also *Griffin v. Griffin* (1946), 327 U.S. 220, 90 L. Ed. 635, 66 Sup. Ct. 556.

The appellant having personally submitted to the jurisdiction of the trial court in this action, it has the power to adjudicate both the issue of custody and support of the child of the parties and the issue of alimony. It likewise follows the court has jurisdiction to pass on and grant attorney's fees.

The trial court did not abuse its discretion in exercising its equitable powers to restrain the appellant from the collection of the $69 supreme court costs while the appellant was in arrears for the support of his minor child under an order to pay alimony and support money. The record shows the appellant was in default in the payment of support and alimony and the question of his being in contempt of court for failure to comply with the court commissioner's order of April 9, 1958, was before the court. We find no injustice to the appellant in restraining him from collecting the court costs under the circumstances or any equity in allowing him to do so.

By the Court. The orders appealed from are affirmed.

APPENDIX H

(Pertinent portions of Remittitur of Supreme Court of Wisconsin)

Be It Remembered, That at a term of the Supreme Court of the State of Wisconsin begun and held at the Capitol, in Madison, the seat of government of said State, on the Second Tuesday of August, A.D. 1959, on the 37th day of the term, to-wit: On the 5th day of January A.D. 1960, Present John E. Martin, Chief Justice, Grover L. Broadfoot, Timothy Brown, George R. Currie, Thomas E. Fairchild, E. Harold Hallows and William H. Dieterich, Justices of said Court, the following proceedings were had, Inter Alia, to-wit:

MARY ELLEN EULE,

Respondent,

v.

RUDOLPH EULE,

Appellant.

Appeal from Circuit Court,
WAUKESHA
County, State of Wisconsin

This cause came on to be heard on appeal from the orders of the Circuit Court of Waukesha County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the orders of the Circuit Court of Waukesha County, appealed from in this cause, be, and the same are hereby affirmed, with costs against the said appellant.

FILE COPY

Office-Supreme Court, U.S.
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MAY 11 1960
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 831

RUDOLPH EULE,

Petitioner,

vs.

MARY ELLEN EULE,

Respondent.

BRIEF IN OPPOSITION TO THE ISSUANCE OF A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

JOHN A. WITTIG
URBAN R. WITTIG
LAWRENCE M. WITTIG
EDMUND J. KRAWCZYK,
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MILWAUKEE

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 831

RUDOLPH EULE,

Petitioner,

vs.

MARY ELLEN EULE,

Respondent.

BRIEF IN OPPOSITION TO THE ISSUANCE OF A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

I. QUESTIONS PRESENTED

A. JURISDICTIONAL QUESTIONS

1. Is the order of the Wisconsin Supreme Court, sought here to be reviewed, a "final judgment" within the purview of *28 U.S.C. 1257?*

2. Is the relief sought by the petitioner herein susceptible of protection by judicial action in this proceeding?

B. SUBSTANTIVE QUESTIONS

3. May full faith and credit be given by a Wisconsin court to an Illinois judgment with respect to the matters of alimony, custody and support money (a) where it is stipulated between counsel in the Wisconsin action that the Illinois court had no jurisdiction over the person of the wife and child of the parties, both of whom were bona-fide residents of Wisconsin; and (b) where the Illinois record itself demonstrates that it had no personal jurisdiction over the respondent or child?

4. Does a Wisconsin court, which has personal jurisdiction over husband and wife, have jurisdiction to decide questions of alimony, support money, custody and suit fees, even though there may have been a valid divorce as to the status of the parties in Illinois where these issues were neither judicially determined nor determinable in the Illinois action?

5. Is a divorce judgment divisible so that a Wisconsin court may give full faith and credit to an Illinois judgment of divorce as far as the status of the parties is concerned but deny full faith and credit as to other matters relating to personal rights?

6. Is a judgment obtained in violation of procedural due process entitled to full faith and credit in another jurisdiction?

7. Is an Illinois judgment which is not final in Illinois entitled to greater effect in Wisconsin via the full faith and credit clause, than in Illinois without regard to the welfare of the child?

STATUTES INVOLVED

28 U.S.C. 1257. State Courts; appeal; certiorari.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State Statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

WISCONSIN STATUTES, 1957

Sec. 48.13. (Vol. I) Jurisdiction over children alleged to be neglected or dependent. The juvenile court shall have *exclusive* jurisdiction over:

(1) A child who is alleged to be neglected because:

(d) He is without necessary subsistence, education or other care necessary for his health, morals or well-being because his parent, guardian or legal custodian neglects or refuses to provide it.

II. STATEMENT OF CASE

A. RE JURISDICTION

The petitioner set forth in his Answer two separate defenses, one asserting the Illinois judgment and the other asserting a defense on the merits of the case. (R-55, 59)

The instant appeal decided only the one defense, and the Wisconsin Supreme Court remanded the case for further proceedings in the trial court.

Trial on the merits of the remaining issues of custody, support and alimony and legal expenses, at the time of the petition herein, was to be had in the trial court. Various issues of fact and of law have been raised by the amended complaint and the answer thereto.

The most important issue raised by the pleadings is the fitness of both parties to have custody of the five year old daughter.

B. RE MERITS OF PETITION HEREIN

Service of process in the Illinois action was made upon respondent in the State of Wisconsin. In the Illinois action which was pending at the time of commencement of this action in Wisconsin, the respondent appeared *specially* to challenge the jurisdiction of the Illinois court. In accordance with Illinois practice respondent by her attorney moved to dismiss the Illinois action for lack of jurisdiction. This motion was denied on January 22, 1958 by the Illinois court and no further appearance was made by respondent in the Illinois action thereafter. (R-110)

After the commencement of this action in Wisconsin on March 18, 1958, the Illinois court entered two orders on March 21, 1958: one recited that the summons was served on respondent and she had *failed to answer or otherwise make an appearance herein* (R-114) and set the hearing on the complaint for the same day at 9:30 A.M. The other Illinois order of March 21, 1958 granted leave instanter to petitioner to amend his complaint *on its face* by adding the following words and paragraph to his prayer for relief therein, namely: "That the sole care, custody, education and control of the minor child of the parties herein, Debra Lee Eule, be granted to the plain-

tiff, Rudolph Eule, and for such other and further relief as to the court may seem fit". (R-118)

This amended complaint was never served on the respondent or her counsel. The original complaint merely asked that the marriage be dissolved and be declared null and void.

Ten days later a default judgment of divorce was entered in the Illinois action which judgment also adjudicated that the petitioner herein have the custody of the minor child. The first knowledge that respondent had that plaintiff was seeking custody of the infant child was when respondent was served with a copy of the default Illinois judgment, awarding custody to petitioner herein.

Subsequently in the Wisconsin action it was stipulated by counsel herein that respondent and the minor child were never at any time within the jurisdiction of the Illinois court. (R-136)

Custody and Support of Minor Daughter.

Respondent and child left petitioner when the daughter was ten months old and the parties have been litigating ever since. Respondent has had custody of the minor daughter ever since. Petitioner has not even visited his daughter in the last three years. (R-24) It is alleged that petitioner on numerous occasions beat the infant child of the parties since she was six weeks old. (R-16) It is also alleged that petitioner was ready to sell the infant child for $5,000.00 in New York and said he would give up all rights to her (R-16); and further that petitioner has a violent temper and has struck the infant child without cause so many times that she became a nervous

wreck; and that petitioner is an unfit person to have custody of the minor child, now age five. (R-16)

The usual order for temporary alimony and support was entered on April 9, 1958 requiring petitioner to pay $20.00 per week support money for the minor child and $5.00 per week temporary alimony. (R-18,19) The petitioner has not paid 1¢ for the support of his daughter since this action was commenced in 1958. (R-148) Petitioner has paid only $16.00 for support and alimony since September 19, 1956. (R-148) Petitioner in his Answer admits that he is an able-bodied man capable of earning a salary sufficient to take care of his needs. (R-56)

On June 15, 1959 after due notice and hearing the petitioner was adjudged guilty of contempt for failure to pay temporary support and alimony and sentenced to thirty days in the Waukesha County jail. (R-154) Petitioner resides in Chicago, Illinois, and hence is beyond reach of the Wisconsin process.

C. RE: TERMINATION OF PARENTAL RIGHTS OF PETITIONER

In an independent action in the Juvenile Court of Waukesha County, Wisconsin, entitled "In the Matter of the Termination of Parental Rights to Debra Eule, a minor" the parental rights of Rudolph Eule, petitioner herein, were terminated. (App. I) This proceeding was commenced on March 25, 1959. The petitioner herein appeared specially by counsel to assert that said Juvenile Court had no jurisdiction over the subject matter. This special appearance was overruled.

The Juvenile Court entered its Findings of Fact and Conclusions of Law on July 2, 1959 (App. J) finding

among other matters that Debra Eule, a minor, had been a continuous and bona fide resident of the County of Waukesha since November 27, 1955 and that her legal settlement was in Waukesha County; that the petitioner herein repeatedly struck his daughter when she was less than one year old and that he "swore and shouted at her"; that he had failed to provide her with any money or support since March, 1957.

As a legal conclusion the court found that the petitioner herein, although financially able, had substantially and continuously over the past two years neglected to provide said minor with necessary subsistence, education, and other care necessary for her health, morals and well-being.

ARGUMENT

A. JURISDICTIONAL QUESTIONS

1. The order of the Wisconsin Supreme Court sought here to be reviewed is not a "final judgment" within the scope of *28 U.S.C. 1257.*

The petitioner has elected in his answer to the complaint to plead two defenses. One a defense on the merit and two, the defense of the prior Illinois judgment. The Wisconsin Supreme Court has only disposed of the one defense pertaining to the Illinois judgment. That court then remanded the case to the trial court for trial of the issues raised by the remaining defense pleaded by petitioner.

It is conceivable that petitioner will obtain the relief he seeks in the Wisconsin court. As stated in *Robertson and Kirkham Jurisdiction of Supreme Court of the United States, Sec. 35:* "Where the highest court of a

state decides on a first appeal a federal question against appellant and remands the case for further proceedings and on further hearing the trial court renders judgment against him, he cannot have the judgment reviewed by the Supreme Court without first *appealing from it to the highest court* of the state, even though that court declines upon a second appeal to reconsider any question of law decided upon the first appeal." *Great Western Telephone vs. Burnham*, 162 U.S. 339 at page 345.

2. The relief sought by petitioner herein is not susceptible of protection by judicial action in this proceeding.

The petitioner seeks to have enforced the Illinois default judgment awarding him custody in March of 1958.

It is elemental that the right to custody is not an absolute right. Both in Illinois and Wisconsin as well as in other states the question of custody remains open and subject to alteration or change by a court of competent jurisdiction upon a showing of a change in circumstances. During the period from the time of entry of judgment in Illinois to the time of hearing in the Juvenile Court of Waukesha County petitioner forfeited his right to custody.

Failure of a parent to provide necessaries for a child is good ground for forfeiture of his right to its custody. *39 Am. Jur. 617 (Sec. 27)* In Wisconsin, only the Juvenile Court may terminate parental rights. Since the time for appealing from the judgment of the Waukesha Juvenile Court has long since expired and since the petitioner failed to perfect an appeal therein, this court is

without jurisdiction to grant the relief requested by petitioner. *Sec. 48.13 of the Wis. Stats.* reads:

> "The Juvenile Court shall have *exclusive* jurisdiction of (1) a child who is alleged to be neglected because (d) he is without necessary subsistence, education or other care necessary for his health, morals or well-being because his parent, guardian or legal custodian neglects or refuses to provide it." (Emphasis mine)

B. SUBSTANTIVE QUESTIONS

It was stipulated to in the trial court upon the hearing of the motion for summary judgment that the respondent and the minor child "were never at any time within the jurisdiction of the Illinois court". (R-167) Neither the mother nor the child was within the state of Illinois at any time during the Illinois proceedings and the Illinois record shows that respondent was served with Illinois process in the state of Wisconsin, hence, it is obvious that the Illinois court had no jurisdiction over the person of the respondent.

Esenwein v. Penn, 325 U.S. 279:

> Headnote 4: "Where a state court has denied full faith and credit to a judgment of a sister state on evidence warranting the conclusion that it was rendered without jurisdiction, the Supreme Court will not retry the facts."

In addition, the record itself of the Illinois action demonstrates conclusively that there was a special appearance by respondent in the Illinois action, which appearance was limited to an attack upon the jurisdiction of the Illinois court and when that failed there was no further appearance or participation in the Illinois

action by the respondent. There was never any personal appearance by respondent in that action.

It has been the constitutional rule in this country since *Pennoyer v. Neff*, 95 U.S. 714 (1878), that nonresidents cannot be subjected to *personal* judgments without personal service within the state or a general appearance. *160 A.L.R. 403:* (1946 Edition) The later cases agree that custody provisions of a divorce decree are without extra-territorial effect if, either generally or with regard to the child, the court was without jurisdiction. This rule, of course, has been followed in Wisconsin in *Davis v. Davis*, 259 Wis. 1, PP. 5-6:

> "The court still holds, however, that where the defendant is not served with process in the state of the forum and takes no part whatever in the proceedings, he or she is not concluded by the judgment and the state where the parties admittedly resided up to the time of the divorce is not required to extend faith and credit to the judgment under such circumstances."

28 A. L. R. 2nd P. 1390:

> "It is now settled that a judgment for alimony, or for alimony in a divorce decree, because partaking of the nature of a judgment in personam, is invalid as violation of the due process requirements of the Federal Constitution, where it has been rendered by court having no jurisdiction over the person of the defendant." *Griffin v. Griffin* (1946) 327 U.S. 220

Both before and after the *Williams* cases cited by appellant, the courts have consistently held that a court cannot have jurisdiction to award a child's custody when the child is outside the state at the time the court enters its decree and when the court has jurisdiction neither of the child's person nor of the person of the parent

who has the child with him outside of the state. That position was reaffirmed by the U.S. Supreme Court in *May v. Anderson*, 345 U.S. 528 (1952). (This case involved a divorce decree granted by the Circuit Court of Waukesha County, Wisconsin.) In fact, the United States Supreme Court went a step further:

Headnote 6:

> "In the absence of personal jurisdiction over the wife, a decree awarding the custody of children to the husband obtained by him in an ex parte divorce proceeding is not entitled to full faith and credit, *even though at the time the decree was made the children were domiciled in the state in which it was entered.*" (Emphasis mine)

May case, P. 533:

> "Separated as our issue is from that of the future interests of the children, we have before us the elemental question whether a court of a state where a mother is neither domiciled, resident, nor present may cut off her immediate right to the care, custody, management and companionship of her minor children without having jurisdiction over her *in personam*. Rights far more precious to appellant than property rights will be cut off if she is to be bound by the Wisconsin award of custody." (Emphasis mine)
>
> "It is now too well settled to be open to further dispute that the 'full faith and credit' clause and the Act of Congress passed pursuant to it do not entitle a judgment in personam to extra-territorial effect if it be made to appear that it was rendered without jurisdiction over the person sought to be bound."

May case, PP. 533 and 534:

> "In Estin v. Estin, 334 U.S. 541, this court upheld the validity of a Nevada divorce obtained ex parte

by a husband resident in Nevada *insofar as it dissolved the bonds of matrimony*. At the same time we held Nevada powerless to cut off in that proceeding a spouse's right to financial support under the prior decree of another state. In the instant case, we recognize that *a mother's right to custody of her children is a personal right* entitled to at least as much protection as her right of alimony." (Emphasis mine)

The *May* case is cited with approval in *Armstrong v. Armstrong*, 350 U.S. 568:

Headnote 1: "A state court in awarding alimony to a wife whose husband has obtained a valid ex parte divorce decree in a sister state does not fail to give full faith and credit to the decree of the sister state where that decree refuses to pass on the question of alimony and does not purport to adjudicate the non-resident wife's right thereto."

Headnote 6: "A decree denying alimony to a non-resident wife in divorce proceedings in which she has not been personally served with process in the state and has not appeared as a party, is not entitled to full faith and credit."

In the *Armstrong* case at P. 576:

"* * * We believe that Ohio was not compelled to give full faith and credit to the Florida decree denying alimony to Mrs. Armstrong. Our view is based on the *absence of power* in the Florida court to render a personal judgment against Mrs. Armstrong depriving her of all right to alimony although she was a non-resident of Florida, had not been personally served with process in that state, and had not appeared as a party.

* * * We held in Estin v. Estin (supra) that an alimony judgment was this kind of 'personal judgment'."

Armstrong case, P. 569:

"The sole question presented by the petition for certiorari was whether the Ohio courts were required to give full faith and credit to the ex parte Florida divorce decree * * * The Ohio courts, therefore, in awarding alimony to the wife, did not in fact fail to give full faith and credit to the Florida decree."

The appellant cites *17 Am. Jur. Sec. 994, p. 176.* We cite from the same section:

"If the divorce court did not have jurisdiction, either generally or with respect to custody, the provisions of the divorce decree with respect to custody need not be given effect in any other jurisdiction * * * "

Page 177:

"Even though the divorce state deems that it has jurisdiction to award custody upon constructive service where the child has a technical domicil within the state but is absent when the action is begun, a decree thus obtained is not necessarily entitled to full faith and credit. Thus where a nonresident parent has custody of a child in another state after a separation of the spouses, and has a right to custody, this is a personal right which cannot be terminated without jurisdiction over such parent in personam; the divorce court, in a state in which he or she is not domiciled, cannot gain jurisdiction to terminate that right by constructive service. It is similarly held that if the child resides with a third person in one state and the mother obtains a divorce in another state, an award of custody upon constructive service will be *deemed void* in the jurisdiction in which the child resides.

> Assuming that an order changing custody is valid within the state where entered on constructive service, it not entitled to full faith and credit where the custodian has a domicil outside of the state and the child live at such domicil." (Emphasis mine)

Appellant alleges nothing in his brief to rebut the holding in the *May v. Anderson*, 345 U.S. 528 case, that a custody award obtained in an ex parte divorce is not entitled to full faith and credit.

Appellant in his brief relies upon the following United States cases:

Davis v. Davis, 305 U.S. 32;

North Carolina v. Williams, 317 U.S. 258; and 325 U.S. 226;

Sherrer v. Sherrer, 334 U.S. 343;

Coe v. Coe, 334 U.S. 378

We would distinguish the instant case from those above on the facts.

Davis case. Here there was a decree of separation in Washington, D.C. The husband thereafter brought action in Virginia for divorce and made a full disclosure of the separation decree. Wife was served in the District of Columbia and entered what she labeled a "special appearance" which was overruled. The Supreme Court found that the so-called special appearance was in fact a general appearance stating at P. 43:

> "Plainly her plea and conduct in the Virginia court cannot be regarded as special appearance merely to challenge jurisdiction. Considered in its entirety the record shows that she submitted herself to the jurisdiction of the Virginia Court and is bound by its determination that it had jurisdiction of the subject matter and of the parties."

Williams cases. These cases concern themselves with the question of domicile of the plaintiff in commencing a divorce action. Since we are not challenging the domicile or residence of the husband in the Illinois action, the question is mute.

Sherrer case. Here the wife left Massachusetts and went to Florida and commenced a divorce action there. The husband appeared generally and in person and participated in the trial of the case in Florida. Later the husband attacked the Florida judgment in a Massachusetts court and the Supreme Court held that where the defendant appeared and participated in the original action he is barred from attacking its judgment in a sister state.

Coe case. The husband left Massachusetts and went to Nevada where he commenced a divorce action with servvice on the wife in Massachusetts. The wife went to Nevada and through attorneys filed an answer to the complaint together with a cross complaint for divorce. Both husband and wife appeared in person and by counsel testifying in the Nevada court.

It is obvious that where a party submits himself to the jurisdiction of the court by way of a general appearance or an answer or participation in the trial on the merits that that court has jurisdiction in personam. No such facts were present in the Illinois action commenced by appellant. On the contrary, there was no general appearance, there was no participation in the Illinois action by respondent, and the divorce decree was an ex parte decree as is evidenced by the record of the Illinois court.

In the Illinois action is an order dated March 21, 1958, for a default hearing reciting, among other things " * * *

and she (respondent) having failed to file answer *or otherwise make appearance herein*, the said defendant (respondent) is adjudged in default." (Emphasis mine)

It is significant that appellant has set forth no Illinois law on the question of special appearances. The pertinent sections are *Sections 20 and 48 of the Smith-Hurd Illinois Annotated Statutes, Chapter 110:*

> Sec. 20(3). "If the court sustains the objection (i.e. to jurisdiction) an appropriate order shall be entered. Error in ruling against the defendant on the objection is *waived* by the defendant's taking part in further proceedings in this case unless the objection is on the ground that the defendant is not amenable to process issued by a court of this state." (Emphasis mine)
>
> Sec. 48(1). Defendant may within the time for pleading file a motion for dismissal of the action or for other appropriate relief upon any of the following grounds * * *
>
> (a) That the court does not have jurisdiction of the subject matter of the action, provided the defect cannot be removed by a transfer of the case to a court having jurisdiction.
>
> (c) That there is another action pending between the same parties for the same cause.

It is apparent that respondent's Illinois counsel followed the Illinois statutory procedure on special appearances and the attendant motion to dismiss.

Respondent therefore submits that the trial court gave full faith and credit to the Illinois judgment insofar as it dissolved the marriage of the parties; the trial court correctly declined to give full faith and credit to that portion of the Illinois judgment pertaining to custody, a personal

right, since the Illinois court did not have jurisdiction in personam over respondent.

It necessarily follows that the Wisconsin court, having personal jurisdiction over the appellant, has jurisdiction to determine the questions of custody, support and alimony and suit fees of respondent.

Lack of Due Process in Illinois Action.

The Illinois action was started, if at all, by service of process on July 5, 1957, by the appellant herein. Respondent entered a special appearance challenging the jurisdiction of that court and followed Illinois procedure in moving for dismissal of the action for lack of jurisdiction. This motion was heard and denied in January, 1958. Respondent made no further appearance therein. On March 21, 1958, three days after the commencement of the instant action in Wisconsin, appellant secretively and ex parte obtained an order of the Illinois court permitting him to amend his complaint instanter to seek custody. The Illinois record contains nothing by way of an attempt to serve notice of this amendment and no notice in fact was ever given to the respondent. On the same day and presumably at the same time, a second order was entered in the Illinois court adjudging respondent in default, ordering the complaint to be taken as confessed against the respondent and setting the matter for hearing at 9:30 A.M. on the same day.

Hence, we have on the same day an order reciting no appearance by the respondent by the same judge who heard and overruled respondent's motion for dismissal for lack of jurisdiction, an order permitting immediate amendment to the complaint and an order adjudging respondent in default and taking the amended complaint as

confessed against respondent, all without any notice of any kind to respondent, and all after it was known to both the court and the appellant that respondent couldn't physically be aware of the drastic change sought ex parte by appellant. So as to eliminate any implication of collusion, we direct this court's attention to the prefacing statement of the order presented to the Illinois court for signature:

> "Summons in this suit *as appears from the return of the sheriff of Cook County thereon* having been duly served upon the defendant, Mary Ellen Eule * * * "

It is obvious that the appellant herein misrepresented the fact about service to the Illinois court so as to lead that court to believe there was personal service within Illinois. In fact there was no affidavit of any kind by the Sheriff of Cook County.

We submit that the lack of notice (i.e. due process) was based upon a material misrepresentation to the court by appellant. Had the true fact of service and special appearance been presented to the court at the time the order was heard, the Illinois court undoubtedly would have required due notice to have been given to respondent before entering either order dated March 21, 1958. However, the fact remains that no notice of any kind was given to respondent who never realized that the custody of her daughter, who had been with her since birth, was being jeopardized.

Griffin v. Griffin, 327 U.S. 220

P. 228: "A judgment obtained in violation of procedural due process is not entitled to full faith and credit when sued upon in another jurisdiction."

P. 229: "Moreover, due process requires that no other jurisdiction shall give effect even as a matter of comity to a judgment."

Such being the case, the Illinois judgment (as to custody award) is not entitled to full faith and credit in Wisconsin.

Illinois Decree Not Complete.

The Illinois judgment is silent as to alimony, support money, division of estate and suit fees.

While a court of one state may dissolve the marriage, matters such as alimony and support and division of property of the parties may properly be determined by a court in another state.

Pollock v. Pollock, 273 Wis. 233, P. 247:

"* * * Under modern decisions it is quite generally held that a divorce action is divisible and that while a court of one state may dissolve a marriage, items such as custody and alimony may be determined by a court in another state which acquires jurisdiction with respect to such matters."

Appellant argues that under the *Leach* case, the wife is not entitled to alimony as a matter of Wisconsin law. That case concerned a trial in Wisconsin of two Wisconsin residents both of whom appeared in a bitterly contested trial after which the court found the wife had left the husband without cause.

No such facts are before this court here. The fact is that the Illinois court did *not* in its decree pass upon or even mention alimony, suit money or disposition of the property of the parties. Hence, jurisdiction is open to sister states to adjudicate these questions.

Illinois Judgment is Not Final in Illinois and Hence has no Constitutional Claim to *Greater Effect in Wisconsin than in Illinois.*

The Wisconsin law as to judgments which are not final in other states has been set out in two rather recent cases:

Ische v. Ische, 252 Wis. 250 @ 262:

> "* * * (The Nevada judgment) is subject to revision and consequently is not a final decree in that state; and therefore does not deprive courts in other states of jurisdiction to change the amount or manner of such payments (alimony and support) in proper proceedings for that purpose."

Setzer v. Setzer, 251 Wis. 234 @ 236:

> "* * * a judgment has no constitutional claim to a more conclusive or final effect in the state of the forum than it has in the state where rendered, and that since a Florida decree involving custody of minor children was not a final decree in the State of Florida, the state of the forum has at least as much leeway to disregard the judgment, to qualify it or to depart from it as does the state where it was rendered * * * The matter seems so clear that a more extended discussion is not warranted."

New York ex rel Halvey v. Halvey, 330 U.S. 610 @ 614:

> "* * * But a judgment has no constitutional claim to a more conclusive or final effect in the state of the forum than it has in the state where rendered. At P. 615 * * * it is clear that the state of the forum has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the state where it was rendered."

Under Illinois law the Illinois courts retain jurisdiction in divorce actions. *Smith-Hurd Illinois Statutes, Chapter 40, Sec. 19:*

> " * * * Irrespective of whether the court has or has not in its decree made an order for the payment of alimony or support, *it may at any time afier the entry of a decree for divorce* upon obtaining jurisdiction of the person of the defendant by service of process or proper notice, make such order for alimony and maintenance of the spouse and the care and support of the children as from the evidence and nature of the case shall be fit, reasonable and just. * * * The court may on application from time to time make such alterations in the allowance of alimony and maintenance and the care, custody and support of the children as shall appear reasonable and proper." (Emphasis mine)

The cases in Illinois holding that the court has the right to modify its decree with respect to alimony, support money and custody are almost limitless. We cite but a few:

Bobowski v. Bobowski, 242 Ill. 524, 90 N.E. 36:

The court retains jurisdiction at a term subsequent to the entry of a decree of divorce to alter or modify the decree for alimony.

Craig v. Craig, 163 Ill. 176, 45 N.E. 153:

The modification of alimony allowed in a divorce suit lies in the discretion of the court.

Maginnis v. Maginnis, 323 Ill. 113; 153 N.E. 654:

Power to make modifications in allowance of alimony is not exhausted by entry of original order fixing amount,

but is a continuing power to modify the decree according to the needs and circumstances of the parties.

Karr v. Rust, 217 Ill. 555:

The court retains jurisdiction in a suit for divorce at all times to enforce, adjust or modify original decree in regard to custody of children as circumstances may subsequently demand.

Callon v. Callon (1955) 5 Ill. App. 2d 480, 125 N.E. 2d 854:

Horn v. Horn (1955) 5 Ill. App. 2d 346, 125 N.E. 2d 539:

Nye v. Nye (1952) 411 Ill. 408, 105 N.E. 2d 300:

After a divorce decree the custody of the children is always subject to the order of the court which enters the decree and may be changed from time to time as the best interests of the children demand.

CONCLUSION

The Illinois court had no jurisdiction over the person of the respondent; therefore it had no authority to adjudicate personal rights.

There was a lack of due process and fraudulent misrepresentation to the Illinois court in asserting to that court that service was made by the sheriff of Cook County, implying personal jurisdiction.

The Illinois court did not adjudicate questions of alimony, disposition of property of the parties, and suit fees. It thereby left these questions open to jurisdiction elsewhere.

Even assuming, for the sake of argument, that the Illinois court had personal jurisdiction over the respondent, its decree is not final in Illinois and Wisconsin may modify it in a proper proceeding.

The appellant has entered a general appearance in the Wisconsin action and is subject to personal jurisdiction.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN A. WITTIG

Attorney for Respondent.

APPENDIX I

STATE OF WISCONSIN : JUVENILE COURT :
WAUKESHA COUNTY

In the Matter of the Termination
of Parental Rights to

DEBRA EULE, JUDGMENT

a Minor.

This matter having been brought on for hearing on the 19th day of June, 1959, at the regular term of this court before the Honorable David L. Dancey, Judge of said Court, and the court having filed its findings of fact and conclusions of law from which it satisfactorily appears and wherein the court finds that all rights of the parent, Rudolph Eule, to the minor, Debra Eule, should be terminated,

IT IS ADJUDGED AND DECREED:

That all rights of the parent, Rudolph Eule, to the above named minor, Debra Eule, be, and they hereby are, terminated.

Dated at Waukesha, Wisconsin, this 2nd day of July, 1959.

BY THE COURT:

(S) DAVID L. DANCEY

APPENDIX J

STATE OF WISCONSIN : JUVENILE COURT :
WAUKESHA COUNTY

In the Matter of the Termination
of Parental Rights to
DEBRA EULE,
a Minor.

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

At a regular term of said court held at the Court House in the City of Waukesha, in said County, on the 19th day of June, 1959, during said term. Present the Honorable David L. Dancey, Juvenile Court Judge, presiding.

The above entitled action having been duly noticed for hearing and the same having come on in its regular order to be heard before the court;

And it appearing that this is an action for termination of the parental rights of Rudolph Eule, and that the notice of hearing in this action could not be personally served on him for the reason that said Rudolph Eule is not a resident of the State of Wisconsin as more fully appears by the affidavits on file herein.

And it further appearing that the petition herein was filed in the office of the Clerk of said Court on the 26th day of March, 1959.

And it further appearing that said notice of hearing was duly published in the Waukesha Daily Freeman, a newspaper likely to give notice to Rudolph Eule, once a week for three weeks and that the day of the first publication was on the 23rd day of May, 1959, and that the day of the last publication was on the 6th day of June, 1959, as appears by the affidavit of the publisher on file herein.

And the petitioner appearing in person and by Wittig and Wittig, attorneys, by John A. Wittig, and said Rudolph Eule appearing specially by Glassner, Clancy & Glassner, by William Glassner, and after hearing the testimony and proofs submitted, I, David L. Dancey, the judge before whom this matter was heard, do make these findings of fact and conclusions of law, as follows, to-wit:

FINDINGS OF FACT

1. That since November 27, 1955, Debra Eule, a minor, has been a continuous and bona fide resident of the County of Waukesha, State of Wisconsin; that said minor resides with her mother in the City of Oconomowoc, Waukesha County, Wisconsin.

2. That said Debra Eule was born on January 6, 1955, and that her mother is Mary Ellen Eule, Oconomowoc, Wisconsin, and her father is Rudolph Eule, Chicago, Illinois.

3. That said Rudolph Eule repeatedly struck Debra Eule when she was less than one year old, and that he repeatedly swore and shouted at her.

4. That said Rudolph Eule has failed to provide Debra Eule with any money or support since March, 1957.

5. That in February, 1959, Rudolph Eule was employed as President and Treasurer of Tri-Ab Inc., an Illinois corporation, in Chicago, Illinois.

6. That notice of this hearing was duly given to Rudolph Eule by registered mail and by publication once a week for three weeks, and I find as

CONCLUSIONS OF LAW

1. That the legal settlement of Debra Eule is in Waukesha County, and that said Debra Eule is a resident of Waukesha County.

2. That all rights of the parent, Rudolph Eule, should be terminated forthwith.

3. That this court has exclusive jurisdiction to terminate parental rights.

4. That Rudolph Eule, although financially able, has substantially and continuously, over the past two years, neglected to provide Debra Eule, a minor, with necessary subsistence, education, and other care necessary for her health, morals and well-being.

Let judgment be entered accordingly.

Dated at Waukesha, Wisconsin, this 2 day of July, 1959.

BY THE COURT:

(S) DAVID L. DANCEY
Juvenile Court Judge.